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SUNSHINE PERIOD

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

MAR 17 1994

In the Matter of )  
Request for Declaratory Ruling )  
Regarding the Multiplexing )  
and Negative Option Provisions )  
of the Commission's Rules )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CSR-4236-R  
No Code

To: The Commission

REQUEST FOR DECLARATORY RULING

Showtime Networks Inc. ("SNI"), by its attorneys, hereby requests a declaratory ruling regarding the Commission's definition of "multiplexed or time shifted" programming and its interpretation of the "negative option" prohibitions of the Commission's rules. This request is made, in part, as a response to a requested clarification sought by Encore Media Corporation ("Encore") on February 15, 1994 (a copy of which is attached as Attachment 1).

Specifically, SNI seeks a determination (1) whether a packaged offering of several separate, commonly-owned, program services -- each consisting entirely or predominantly of different programming -- is a "multiplexed or time shifted" per channel service (or tier or package of per channel offerings) exempt from rate regulation when such programmatically distinct services are not also made available separately on a per channel basis; and (2) whether and under what circumstances the charges and service components of a "multiplexed or time shifted" service can be changed without the affirmative consent of the subscriber.

I. The Commission Has Exempted "Multiplexed or Time Shifted" Programming from Rate Regulation

In promulgating its regulations to implement the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992<sup>1</sup> (the "1992 Cable Act" or the "Act"), the Commission determined that, in addition to the per channel and per program services specifically excluded from rate regulation under the Act, it would exclude a "combination of multiple channels of pay-per-channel or pay-per-program video programming offered on a multiplexed or time-shifted basis so long as the combined service: (i) consists of commonly-identified video programming; and (ii) is not bundled with any regulated tier of service." 47 CFR § 76.901(b)(3). In concluding that program services offered on a "multiplexed" basis were not subject to regulation, the Commission relied on language in the 1992 Cable Act's legislative history indicating that Congress intended the rates for "multiplexed" premium services to be non-regulated.<sup>2</sup> The exception for "multiplexed" programming received little clarifying discussion.<sup>3</sup> Indeed, neither the legislative

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<sup>1</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>2</sup> See House Report at 80 ("The Committee intends for these 'multiplexed' premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate tier or as a stand-alone purchase option.").

<sup>3</sup> This is to be contrasted with the exception created by the Commission for "packages" of per channel program services  
(continued...)

history, the Rate Order nor the Commission's rules contain any further clarification of the phrases "multiplexed or time shifted" or "commonly-identified video programming."<sup>4</sup>

II. The Commission Must Ensure that It Does Not Invite Rate Regulation Evasion by Allowing a Programmer to Call a Tier of Distinct Services a "Multiplexed" Offering

Recently, Encore, an affiliate of Liberty Media Corporation ("Liberty Media") and Tele-Communications, Inc. ("TCI"),<sup>5</sup> has

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<sup>3</sup>(...continued)

which may be offered by cable operators on a non-rate regulated basis. This provision of the rules was the subject of significant discussion in the Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-266, FCC 93-177 (rel. May 3, 1993) (the "Rate Order"). Indeed, the Commission recently announced the adoption of additional guidelines to be used to determine whether a particular package of à la carte services is a legitimate offering exempt from rate regulation or impermissible rate regulation evasion. See FCC News Release, Third Order on Reconsideration in Cable Rate Regulation and Tier Buy-Through Proceedings (MM Docket Nos. 92-266 and 92-262), Executive Summary (rel. Feb. 22, 1994), at 4.

<sup>4</sup> The Commission's Second Report and Order in MM Docket No. 92-264 (Horizontal and Vertical Ownership Limits), FCC 93-456 (rel. Oct 22, 1993), discussed "multiplexed services" in the context of determining whether such services should be considered to be one "channel" for purposes of implementing the 1992 Cable Act's vertical ownership provisions. Id. at ¶¶ 74, 76-77. While concluding that each channel in a multiplexed offering would count as a separate channel for purposes of determining compliance with the vertical ownership limits, the Commission did not attempt to set forth the parameters of "multiplexed or time-shifted programming" for purposes of determining the circumstances under which a particular "multiplexed" offering would be exempt from rate regulation.

<sup>5</sup> It is SNI's understanding that 90% of Encore is owned by Liberty Media. As the Commission is well aware, Liberty Media has announced plans to merge with and into TCI, the largest multiple system operator in the United States.

begun to advertise a new offering it characterizes as "multiplexed." Encore's request for clarification of the definition of "multiplexing" is apparently designed to ensure that its new offering is exempt from rate regulation. It appears, however, that Encore/TCI is seeking to define "multiplexing" as something well beyond what Congress or the Commission intended.

Currently, Encore/TCI offers both "Encore," a single "mini-pay" service that offers movies produced in the 1960s through the 1980s, and "STARZ!," which was launched as a "full premium" service on February 1, 1994 in TCI systems nationwide. Encore/TCI has announced plans to expand its "Encore" offering to include six new services, which will be packaged together as something it calls a "Thematic Multiplex." Press reports indicate that each of the six services will offer programming comprising a unique genre.<sup>6</sup> To SNI's knowledge, this program offering is different from existing "multiplexed" services offered by SNI and HBO, which consist primarily of the same programming offered on a time-shifted basis, giving the viewer two or more programming options at the same time.

Encore/TCI has been touting its version of a "multiplexed" service to cable operators as one that can be offered as a tier

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<sup>6</sup> The six programming classifications are love stories, westerns, mystery, action/adventure, true stories/drama, and "tweens." Encore/TCI has also used the term "Moodplex" and "Mood on Demand" to describe these offerings.

of program services that is not subject to the Commission's rate regulations -- even though these programmatically distinct services are not also available to subscribers on an à la carte basis. See Exhibit A. The basis for Encore/TCI's claim appears to be the exemption from rate regulation for "multiplexed" programming crafted by the Commission in its Rate Order.<sup>7</sup>

Encore/TCI seeks to interpret the rate regulation rules applicable to multiplexed offerings in a manner that appears to go far beyond the limited exemption contemplated by Congress and the Commission. In Encore/TCI's view, merely promoting a package of programmatically distinct services as a "multiplexed" offering should result in exemption from rate regulation, even when those services are not also made available on an à la carte basis.<sup>8</sup> Such an expansive interpretation of "multiplexing" would create a

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<sup>7</sup> See, e.g., Sie, John J., Edited Speech to the Washington Metropolitan Cable Club, July 22, 1993, pertinent portions of which are attached hereto as Exhibit B ("One of the real bonuses of ENCORE's Thematic Multiplex is that, under the Act, cable operators can offer our seven channels as a separate tier and be exempt from rate regulation. This means that operators can generate unregulated cash flow even before compression technology arrives for a-la-carte offerings.").

<sup>8</sup> Of course, there would be no question of compliance with the Commission's rules if each of the distinct component services of the "Thematic Multiplex" were legitimately available on an à la carte basis to cable subscribers in a manner that qualified as a rate-exempt package of per channel services. See supra note 3. Such packages, as the Commission has properly determined, benefit consumers by maintaining the ability to choose from among several per channel services and by decreasing the total rate to those who wish to subscribe to all of the packaged services. Here, however, as SNI understands Encore/TCI's plans, subscribers will have no such à la carte option.

very large loophole in the rate regulation regime. If accepted, a programmer could create an offering consisting of a movie service, sports service, news service, educational/informational service, music service, all-talk service, and children's service, call it a "Family Multiplex" and have it offered to consumers as a rate-exempt tier -- even though none of the component services were made available on an à la carte basis. This, clearly, could not have been Congress' intent.

In order to prevent such a result, SNI submits that the Commission should reject Encore's suggested clarification and set forth the parameters under which a programmer may offer a package of several commonly-owned but programmatically distinct program services in a manner that is exempt from rate regulation. SNI submits that these distinct services (as opposed to primarily time-shifted services such as HBO2 and HBO3 and Showtime 2) should be offered on an à la carte basis before they can receive "per channel" (i.e., rate regulation-exempt) treatment under the Act. It should not be sufficient that each of the services is commonly-owned or commonly-identified by the programmer and advertised as a "multiplexed" service.

To preclude such gamesmanship, the Commission is respectfully urged to confirm that, in order for a "multiplexed" offering to be exempt from rate regulation, the programming offered on each of the "multiplexed" channels must consist primarily of the same programming offered on a time-shifted

basis. Any offerings comprised primarily of different programming (whether called a "multiplex" or not) must be separately available to subscribers on an à la carte basis and satisfy all other requirements of "packaged" services in order to be exempt from rate regulation. Otherwise, it would be relatively simple to package a variety of distinct services that merely have commonly-identified names, offer them not on an à la carte basis, but solely as a "multiplexed" service, and thereby avoid the constraints of rate regulation.

### III. Negative Option Prohibition

In addition to regulating the rates for cable programming services, the Act also prohibits a cable operator from charging for "any service or equipment that the subscriber has not affirmatively requested by name." 47 U.S.C. § 543(f). This prohibition, however, does not apply to changes in programming services that are included in various tiers of cable services. See 1992 Cable Act, Conference Report at 65. Thus, a cable operator may, under certain circumstances, change or add to the program services offered on regulated tiers without obtaining each subscriber's consent for each such change.

Encore/TCI has been touting its "Thematic Multiplex" service in trade press advertisements as follows:

**Multiplex for ever-increasing unregulated cash flow.**

For even more cash flow, plan now to add Mood on Demand channels in July 1994. Add one at a time or add all six of our new channels without violating the negative option provisions of the Cable Act. Boosting your cash flow is as easy as choosing our channels.<sup>9</sup>

Encore/TCI once again appears to be "pushing the envelope" -- this time in its interpretation of the negative option provision. Encore/TCI is telling cable operators that, notwithstanding the negative option provision, they can have it all: a tier of program services that is not subject to rate regulation and the ability to add services to and increase charges for that unregulated tier without any affirmative subscriber response. Again, Encore/TCI's view of the Act and the manner of complying with the Commission's rules appear to subvert the policies underlying the Act and the Commission's rules. Accordingly, SNI seeks a declaratory ruling as to the legitimacy of Encore/TCI's claim that, once purchased by subscribers, cable operators may increase the program services contained in, and charges for, its "Thematic Multiplex" without any further affirmative subscriber response, whether the increase is one additional service or many additional services at ever-increasing prices.

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<sup>9</sup> See, e.g., MultiChannel News, Dec. 13, 1993, at 42-43.



#### IV. Conclusion

SNI respectfully asks the Commission to consider this request on an expedited basis. As mentioned, Encore/TCI is already holding out its "Thematic Multiplex" service to cable operators as an unregulated tier of programming. To the extent that a package of services consisting of substantially different programming is truly exempt from rate regulation despite not being available separately on a per channel basis, SNI needs to know quickly so that it can fashion a competitive response.

Accordingly, SNI respectfully requests that the Commission confirm that (i) several distinct program services (not otherwise available on an à la carte basis) do not constitute "time shifted or multiplexed" programming exempt from rate regulation merely because they have been "commonly-identified" by the programmer; and (ii) the negative option provisions of the Act prohibit Encore/TCI from increasing the cost and services made available

to its "Thematic Multiplex" subscribers without obtaining the affirmative consent of those subscribers.

Respectfully submitted,

SHOWTIME NETWORKS INC.

By:



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of

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March 17, 1994

**EXHIBIT A**

**ENCORE  
TRADE PRESS  
ADVERTISING**

ENCORE 1  
THE  
GREEN  
HAT

ENCORE 7  
WELCOME  
ASTRONAUTS  
TRUE STORY  
AND  
DREAM

ENCORE 4  
THE  
TIGER

ENCORE 2  
LOVE  
STORIES

## Launch Encore for cash flow now... Choose any new Multiplex channel(s) for more cash flow in 1994.

If you've been searching high and low for services that deliver high margins with unregulated cash flow, and that achieve high penetration with low churn... look no further. Launch Encore because only Encore gives you:

### **Unregulated cash flow NOW.**

In these tough times, you need unregulated cash flow. With margins of 65% or higher, Encore is the #1 new, unregulated cash flow generator for systems big and small, from coast to coast. A proven performer, Encore is still the fastest growing pay network... 4.2 million strong and accelerating.

### **Multiplex for ever-increasing unregulated cash flow.**

For even more cash flow, plan now to add Mood on Demand channels in July 1994. Add one at a time or add all six of our new channels without violating the negative option provisions of the Cable Act. Boosting your cash flow is as easy as choosing our channels.

### **Seven powerful consumer franchises.**

Encore Multiplex works just like the best of basic cable: broad appeal, high quality and excellent value. Each channel is a powerful consumer franchise that offers great movies for every subscriber. Encore Multiplex will satisfy their demands for dependable quality viewing destinations, 24 hours a day, uncut and commercial free.

### **High penetration and no churn problems.**

Encore Multiplex is easy to explain and very easy to sell. So it achieves high penetration and eliminates the high cost of churn marketing. Once subscribers experience Thematic Multiplex's dependable destination viewing, they'll rely on it as an integral part of their cable service.

Your Encore representative can put you on the road to unregulated cash flow NOW and direct you to six new turbo-charged cash flow generators in 1994.



Corporate	303 771-7700
Northeast	908 272-0868
Southeast	404 394-3388
Central	708 827-0099
West	310 477-9922
Texas	214 417-2888

## **MULTIPLEX**

Encore 2 - Love Stories	Encore 3 - Western	Encore 4 - Teens
Encore 5 - Mystery	Encore 6 - Action	Encore 7 - True Stories & Drama

See *The Sandpiper*, *The Magnificent Seven*, *The Breakfast Club*, *Hammet*, *Gotcha!* and *The Right Stuff* on Encore Multiplex.

**EXHIBIT B**

**Pertinent Portions  
of  
Edited Speech  
to  
Washington Metropolitan Cable Club**

**JOHN J. SIE**

**July 22, 1993**

**THE IMPACT OF THE 1992 CABLE ACT  
AND THE ADVANCEMENT OF TECHNOLOGY  
ON THE FUTURE TRENDS OF CABLE PROGRAMMING**

**John J. Sie,  
Chairman/CEO ENCORE Media Corp.  
Edited Speech to the Washington Metropolitan Cable Club  
July 22, 1993**

Good afternoon. Today I'd like to share with you my views on the impact of the 1992 Cable Act and the advancement of technology on the future trends of cable programming.

Over the next four to six weeks, we are going to see a major and unprecedented upheaval brought to an unsuspecting public. Subscribers think that their cable bills are simply going to drop by 10%, according to advance reports in the media. Instead, they'll see the cable channel line-up reshuffled, with some services dropped, some services added. Cable rates will go up for some but drop for others, and subscribers will be sent new channel cards, new rate cards, brochures and notices. They'll be inundated with marketing blitzes to upgrade to pay services with unprecedented discounts, and perhaps they'll be saturated with contradictory TV ads by both broadcasters and cable, each blaming the other for taking away subscribers' favorite broadcast stations. I think the cable subscribers will be utterly confused and upset as cable operators throughout the land try to implement the most draconian regulatory law ever imposed on a privately financed industry -- an industry built without the help of any tax dollars from the government.

This is happening just as cable was beginning to reach its stride as the electronic medium of choice. The development of American cable programming, technology, and business and management expertise are the very envy of the world. As this Administration is wrestling with the problems of trade deficit and jobs, American cable companies are spreading throughout the globe, building cable systems in the U.K., Israel, Malta, Hungary, and on and on. We've barely begun to scratch the surface. And all this is possible because we have a very strong and vibrant



Stories and Drama, and TWEENS. TWEENS is a channel devoted to families with 8-16 year olds. On the TWEENS channel, which targets an impressionable group during their transition years, we will only schedule programming with wholesome entertainment and positive values.

We are also determined to improve the education landscape in this country. We want to make a real difference. On TWEENS, we have provided, as a public service, 40 hours a week of Cable in the Classroom video supplements to existing school curriculum as a "Teachers' Aid on Demand." It will be scheduled and programmed every school day from 7:00 a.m. to 3:00 p.m. by the Agency for Instructional Technology, the largest provider of instructional television in North America. The real time curriculum will cover primary subjects in Science, Math, Social Studies, and Language Arts at all grade levels as well as secondary subjects like Arts, Career, and Health. The TWEENS' Cable in the Classroom will also have an interactive component called Zing for immediate student reinforcement of the presented video material. Parents and shut-ins can also tune in and follow along.

One of the real bonuses of ENCORE's Thematic Multiplex Plan is that, under the Act cable operators can offer our seven channels as a separate tier and be exempt from rate regulation. This means that operators can generate unregulated cash flow even before compression technology arrives for a-la-carte offerings.

In an otherwise somber keynote speech at the 1993 NCTA convention, FCC Chairman Quello pointed to ENCORE's plan as a creative solution under regulation. I quote, ". . . By multiplexing, ENCORE can create its own tier and yet still be considered a 'per channel' service under the Act that should be exempt from rate regulation . . ." He adds further, "subscribers

should benefit by receiving seven movie channels for the price of one." Our advertising department could not have written a better line.

Now, let me focus a bit on technology. Cable is being recognized as the electronic medium of choice in the "Information Superhighway" for the 21st century. This recognition is primarily due to two developments: fiberoptic deployment to the neighborhood, and digital compression (which can expand channel capacity ten-fold) to the home. This infrastructure will probably be in place by 1996 and can be constructed at about one-tenth of the cost of what it would cost the telcos. This advantage is not lost on others outside the cable industry such as computer, telecommunications, consumer electronics, entertainment and data/software industries. Hardly a week goes by without some announcement of a major alliance with the cable industry. However, what to put on those 500 channels is much less certain. In a way, it is unfortunate that the "500-channel" terminology has seeped into the consumer psyche. The public already feels that cable is too expensive at 50 channels; what are they going to do with and pay for 500 channels? It is unfortunate because "500 channel" is only a euphemism for an advanced technical platform rather than specific program offerings to the consumer. We hear all kinds of hyperbolic pronouncements and projections. They become outright dangerous when uttered by technologists and futurists, the former always having to justify the latest technical whizbangs and the latter believing anything is possible. Let's look at three very popular forecasts of what'll be on the 500-channel system.

First, the magazine rack analogy. Cable will resemble a video version of the magazine rack, catering to a wide array of narrow interest categories. Second, Esoterica. The media often banters about very esoteric channels covering topics like the tse-tse fly's sexual behavior or the

## ATTACHMENT 1

# **BARAFF, KOERNER, OLENDER & HOCHBERG, P. C.**

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ROBERT BENNETT LUBIC**

**FAX: (202) 696-8202**

**February 15, 1994**

**BY HAND**

**William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554**

**Re: MM Docket No. 92-266**

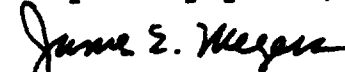
**Dear Mr. Caton:**

**On February 14, 1994, representatives of ENCORE MEDIA CORPORATION and the undersigned met with Chairman Hundt, his assistant, Karen Brinkmann, Maureen O'Connell of Commissioner Quello's office and James Coltharp of Commissioner Barrett's office. Our meetings began after 3:00 p.m. and did not conclude in time to notify you before the close of business on the 14th, but we are doing so this morning.**

**The purpose of the meetings was to discuss a clarification of the manner in which premium services offered over cable television systems may be multiplexed consistent with unregulated program service offerings. We have submitted this date the substance of our recommended clarification.**

**We also discussed the packaging of a la carte video program service offerings.**

**Very truly yours,**



**James E. Meyers  
Counsel for  
Encore Media Corporation**

**cc (w/enc.) BY HAND  
Reed Hundt  
Maureen O'Connell  
James Coltharp**

Recommended Clarifications to Paragraph 326 of Rate Report & Order, dated May 3, 1993, FCC 93-177.

In our First Rate Report & Order, consistent with Congressional intent, we "exclud[ed] from the definition of cable programming service per-channel or per-program premium services offered on a multiplexed or time-shifted basis" and concluded that such services will therefore not be subject to rate regulation complaints so long as they consist of "commonly-identified video programming." In this Report and Order, we aim to further clarify: (i) what services are covered by the multiplex exemption, (ii) the applicable meaning of the term "multiplex", and (iii) the scope and nature of the multiplex exemption within the Rate Regulation provisions of the Cable Act.

The legislative record is clear<sup>1</sup> that the exemption from rate regulation applies only to "Premium Service(s)" that have already multiplexed or which multiplex in the future. It does not apply to non-premium services that cable operators choose to offer on a per-programming, per-channel or pay-per-view basis.<sup>2</sup> Congress at House Report pages 79 and 90 defines Premium Service(s) as a service(s) that traditionally and historically was offered on a per channel basis. We recognize that per-channel, per-program service offerings that are Premium Service(s) are those that were so offered [upon enactment of the Cable Act] [upon the issuing date of the House Report]. Although neither Premium Service(s), as defined above, or other service(s) offered on a per channel per program basis are subject to rate regulation when offered as stand alone or single per channel offering(s), the multiplex exemption applies only to Premium Service(s).

Multiplexing is defined as the offering of multiple channels of commonly identified video programming as a separate tier.<sup>3</sup> The House Report uses HBO and its two multiplexed channels (HBO2 and HBO3) as an example of multiplex premium channels.<sup>4</sup> HBO is the premium channel and HBO2 and HBO3 are the multiplexed channels of HBO. To the extent that the Act provides tier exemption to the experimenting of multiplexing, of Premium Services(s), the scheduling patterns of the commonly identified video programming on

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<sup>1</sup>H. Rep. 102-628, 1022 Cong., 20 Sess. (June 29, 1992) ("House Report") at pp. 80, 90.

<sup>2</sup>Id.

<sup>3</sup>House Report, p. 80.

<sup>4</sup>For purposes of clarifying the multiplex exemption, we use HBO throughout for illustrative purposes only, and note that the references to HBO apply equally to all other premium services (e.g., Encore, Showtime, Disney).

the multiplexed channels of Premium Service(s) can be quite broad on a monthly basis.<sup>5</sup> Programmers' scheduling options include, but are not limited to: (i) Time Shifting -- taking the same mix of titles on the Premium Service during the month and scheduling them during different dayparts on the different multiplex channels for greater viewer choice;<sup>6</sup> (ii) counter-programming either by demographics (male, female, teens like HBO's multiplex) or by genre (love stories, mystery, etc. like Encore's Thematic Multiplex); and/or (iii) by offering more variety of choices such that the expansion of the Premium channel (e.g., HBO) to its multiplex channels would offer consumers additional unduplicated programming over that which would appear on the Premium channel (e.g., HBO) within any given month.

The Multiplexed Premium Service(s)/Channel(s), when offered as a separate tier, should be treated for rate regulation purposes in the same manner as a single channel premium service, (e.g., to the subscriber of HBO when HBO expands to its multiplex offering of HBO, HBO2, HBO3 tier, as long as all HBO subscriptions on the system after the multiplex tier is introduced come only in the form of the multiplex tier, no new per-channel services are deemed to have been added to the system). However, with the permission of the video programming vendor, a cable operator(s) may choose to offer any of the multiplexed premium channel as stand alone single channel purchase option(s) and such per-channel offering(s) are likewise not subject to rate regulation.<sup>7</sup>

For purposes of a la carte packaging, pursuant to paragraph 327 of our First Rate Report and Order, Multiplexed Premium Service(s) tiers are treated as single channel Premium Services(s) without any distinction.

We note, however, that where a cable operator bundles an entire Multiplex Premium Service tier or any individual multiplexed channels with a regulated service tier, such bundled multiplexed channels are subject to rate regulation.<sup>8</sup>

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<sup>5</sup>We note that most premium services are offered on a monthly subscription basis.

<sup>6</sup>For example, The Disney Channel's recommended multiplex consists of using East Coast and West Coast feeds three hours apart.

<sup>7</sup>House Report, pp. 79-80. We note that the House Report, page 80, states that multiplex channels may be offered either as "a separate tier or as a stand alone purchase option." (Emphasis added).

<sup>8</sup>First Rate Report and Order, p. 206, para. 326.